

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION**

HAYWARD INDUSTRIES, INC.,

Plaintiff,

v.

Civil Action No. 3:20-cv-00710-MOC-SCR

BLUEWORKS CORPORATION,
BLUEWORKS INNOVATION
CORPORATION, NINGBO C.F.
ELECTRONIC TECH CO., LTD.,
NINGBO YISHANG IMPORT AND
EXPORT CO., LTD.,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFF'S SUPPLEMENTAL EVIDENCE

Defendants Blueworks Corporation, Blueworks Innovation Corporation, Ningbo C.F. Electronic Tech Co., Ltd., and Ningbo Yishang Import and Export Co., Ltd. (collectively, "Blueworks") hereby respond to Plaintiff's supplemental evidence submitted in support of its summary judgment motion (Doc. No. 256). Plaintiff's motion is misleading and unpersuasive, and only further underscores the factual disputes that preclude summary judgment here.

1. Plaintiff's motion is misleading in its characterization of the "evidence" submitted. Plaintiff asserts that its exhibits show that Defendants' website was recently updated with new advertising. Plaintiff contrasts the content of a purportedly archived version of www.blueworkspool.com as of October 31, 2023 (Exhibit A) with a version of the site as of January 12, 2024 (Exhibit B). However, Plaintiff's Exhibit A (Doc. No. 256-1) is a web capture of only the homepage at www.blueworkspool.com (which has not changed or not substantially changed since October 31, *see* www.blueworkspool.com) and not any of the subsidiary pages

(e.g., <https://www.blueworkspool.com/replacement-cells/>). Exhibit B includes subsidiary pages. Plaintiff's evidence does not in fact demonstrate that Blueworks website has been updated, as Plaintiff claims. Furthermore, the content from Exhibit B cited in Plaintiff's motion allegedly showing trademark infringement does not appear to be linked anywhere on Blueworks' current site (see www.blueworkspool.com). In other words, a customer browsing replacement salt cells on Blueworks' site would not see this content (unless the customer knew to type the specific URL for it), but rather would see listings that include a disclaimer, e.g., "Blue Works BLT9H salt cell is not sold, produced, or manufactured by Hayward." See <https://www.blueworkspool.com/blue-works-blt9h-salt-cell-product/>.

2. Plaintiff's motion cites statements similar to those upon which its original motion was submitted. There is no "doubling down," as Plaintiff's claim. Rather, Blueworks has consistently made the same or similar statements. Blueworks has done so based on its firm belief that those statements: (a) do not infringe Plaintiff's trademarks, but instead fall squarely into the category of fair use; and (b) are also true statements. For example, Blueworks *does not claim that its products, as a whole*, are "Made By USA Company." (See Doc. No. 256 at 4.) Instead, Blueworks truthfully refers to "Cell Plates Made by USA Company," based on the cell plates' origin. (See Doc. No. 148 at 13.) There is no legitimate basis for Plaintiff's raising these issues again now.

3. Whether the statements cited to by Plaintiff are confusing or misleading to consumers to the extent that they cause Plaintiff harm (*i.e.*, directly result in lost sales to Plaintiff by causing consumers to purchase Blueworks' products, sales that would otherwise be captured by Plaintiff) are disputed questions for a jury to decide. Indeed, Plaintiff's submission of this "new evidence" only underscores that there are factual disputes that preclude summary judgment here.

Dated: January 17, 2024

Respectfully submitted,

/s/ Christina Davidson Trimmer

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2024, the foregoing document was served on all counsel of record using the Court's CM/ECF system, which will send notification of such filing to any CM/ECF participants.

Respectfully submitted,

/s/ Christina Davidson Trimmer

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